

No. 15504

United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant.

VS.

HELEN McARTHUR WILLOUGHBY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Northern Division.

MAY 14 1957
PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Denardo, William G.

—direct61

—cross66

McDonagh, John J.

—direct52

—cross55

Willoughby, Helen McCarthy

—direct47

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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MAX F. DEUTZ,

Asst. U. S. Attorney, Chief, Civil Division;

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600 Federal Building,

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ADOLPH FEIERBACH, ESQ.,

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MELVIN RICHTER,

SEYMOUR FARBER,

SAMUEL D. SLADE and

B. JENKINS MIDDLETON,

Attorneys, Department of Justice,

Washington 25, D. C.

In the District Court of the United States,
Southern District of California, Northern Division

No. 1448—ND

HELEN McCARTHY WILLOUGHBY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now plaintiff, Helen McCarthy Willoughby,
and complains of defendant, and for cause of action
alleges:

I.

That plaintiff is now and at all times herein mentioned was a resident of the City of Tulare, in the County of Tulare, State of California, residing at 333 East Inyo Street, Tulare, California.

II.

That on or about the 1st day of September, 1944, John R. Willoughby entered upon active duty with the Army of the United States; that John R. Willoughby, at said time and date, was assigned Service No. T 184 054 by the Army of the United States; that on or about the 1st day of October, 1944, the said John R. Willoughby purchased and placed in force and effect with the Veterans Administration

of the United States of America National Service Life Insurance Policy Number N-1758-73-96 for the sum of Ten Thousand and no/100 [2*] Dollars (\$10,000.00); that, pursuant to the terms and conditions of said policy, the plaintiff, Helen McCarthy Willoughby, was named the beneficiary of said National Service Life Insurance Policy; and that at all times herein mentioned said Life Insurance Policy was in full force and effect and the plaintiff was named and maintained as beneficiary of said Life Insurance Policy.

III.

That the plaintiff, Helen McCarthy Willoughby, is the mother of John R. Willoughby, and that on or about the 24th day of May, 1952, the said John R. Willoughby died in the City of Fresno, County of Fresno, State of California; that on or about the 15th day of October, 1952, pursuant to the terms and conditions of said policy hereinabove referred to, the plaintiff, Helen McCarthy Willoughby, as beneficiary, made application to the Veterans Administration of the United States of America for payment of the proceeds of said Life Insurance Policy, to wit, the sum of Ten Thousand and no/100 Dollars (\$10,000.00); that on or about the 25th day of March, 1953, the claim of the plaintiff, as aforesaid, was denied by the Veterans Administration of the United States of America; that subsequent to said denial, the plaintiff, Helen McCarthy Willoughby, appealed said denial to the Board of Veterans' Appeals of the Veterans Administration.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

of the United States of America; and that on the 19th day of August, 1953, said appeal was denied by said Board.

IV.

That plaintiff has at all times since the 24th day of May, 1952, continuously made demand upon the Veterans Administration of the United States of America for payment of said claim as hereinbefore set forth and that the said Veterans Administration has refused and continues to refuse to pay the same, and that there is now due, owing and unpaid upon said Life Insurance Policy the sum of Ten Thousand and No/100 Dollars (\$10,000.00), plus interest upon said [3] sum at the rate of seven per cent (7%) per annum from the 24th day of May, 1952, until paid.

Wherefore, plaintiff prays judgment against defendant in the sum of Ten Thousand Dollars (\$10,000.00), together with interest thereon at the rate of seven per cent (7%) per annum from May 24th, 1952, until paid.

/s/ ADOLPH FEIERBACH,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed March 18, 1955. [4]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, UNITED STATES
OF AMERICA, AND DEMAND FOR JURY
TRIAL

Comes Now the defendant, United States of America, and in answer to plaintiff's Complaint on file herein, admits, denies and alleges as follows:

I.

In answer to the allegations contained in Paragraph I of plaintiff's Complaint, the defendant admits the allegations contained therein.

II.

In answer to Paragraph II of plaintiff's Complaint, this answering defendant admits that John R. Willoughby entered active duty with the United States Military Forces and, effective October 1, 1944, was issued National Service Life Insurance in the amount of \$10,000 under Certificate No. N 17 587 396 for which he designated his mother Helen McCarthy Willoughby, the plaintiff herein as sole beneficiary; the defendant denies generally and specifically that [5] said life insurance policy was in full force and effect at all times mentioned in the Complaint. The defendant alleges that said insurance policy lapsed for non-payment of premiums on October 1, 1947.

III.

In answer to Paragraph III of plaintiff's Complaint, the defendant admits the allegations contained therein.

IV.

In answer to Paragraph IV of plaintiff's Complaint, the defendant admits that the plaintiff has continuously made demand upon the Veterans Administration for payment and that the Veterans Administration and the defendant have refused and continue to refuse to make payment; this defendant denies each and every other allegation contained in said Paragraph IV of plaintiff's Complaint.

First Affirmative Defense

For its first affirmative defense, the United States of America alleges as follows:

I.

That John R. Willoughby, herein referred to as the "veteran" entered the active military service of the United States of America in September of 1944.

II.

Effective October 1, 1944, the veteran was issued National Service Life Insurance in the amount of 10,000 under Certificate No. N 17 587 396 on the five year level premium term plan for which he designated his mother, Helen McCarthy Willoughby, who is hereinafter referred to as the plaintiff, as sole beneficiary.

III.

The insurance remained in effect on a premium paying basis until October 1, 1947, when it lapsed for nonpayment of the premium due on that [6] date.

IV.

On July 12, 1948, the veteran executed a non-medical application for reinstatement of the lapsed insurance on a comparative health basis. In said application for reinstatement form, the veteran fraudulently misrepresented his comparative health and his statement regarding any illnesses suffered or treatment obtained since the lapse of the insurance.

V.

The veteran knowingly made such false representations which concern a material fact with intent to deceive.

VI.

The defendant, relying on such false representations made by the veteran reinstated said insurance as of July 1, 1948.

VII.

Said action of the defendant in reinstating said insurance in reliance upon the veteran's misrepresentations was void in law and of no force and effect.

Second Affirmative Defense

For its second affirmative defense, the defendant alleges as follows:

I.

That paragraphs I and II of defendant's First Affirmative Defense are hereby incorporated into this, the Second Affirmative Defense, as though set forth in full.

II.

That the insurance lapsed for nonpayment of premium due on December 1, 1949.

III.

On February 6, 1950, the veteran executed a non-medical reinstatement application which included a certification as to his comparative health. [7]

IV.

That the veteran misrepresented his comparative health condition and the fact that he had not been under treatment for any illness since the lapse of the insurance policy.

V.

That the veteran knowingly made said misrepresentation with intent to deceive the defendant as to a material fact concerning the reinstatement of the insurance policy.

VI.

Relying upon said misrepresentation, the defendant reinstated said insurance effective February 1, 1950. This action of the defendant, based upon the misrepresentation of the veteran, was void in law and of no force and effect.

Third Affirmative Defense

For his Third Affirmative Defense, the defendant alleges as follows:

I.

Paragraphs I and II of defendant's First Affirmative Defense are herein incorporated as though set forth in full in this, the defendant's Third Affirmative Defense.

II.

Said insurance lapsed for nonpayment of premiums due September 1, 1950.

III.

The veteran thereafter executed a reinstatement application form which contained a Certificate of the veteran as to his comparative health since the lapse of the insurance and as to any treatment for illness received by him since the lapse of the insurance.

IV.

That the veteran misrepresented the condition of his health [8] and the statement with reference to treatment for illness since the lapse of the policy.

V.

That the misrepresentation as to his health was knowingly made by the veteran with intent to deceive the defendant as to a material fact in the reinstatement application.

VI.

That a further statement was executed by the veteran on December 1, 1950, in which the veteran stated that he was in as good health on October 18, 1950, as he had been on September 1, 1950, and that he had not received any treatment for illness during the same time.

VII.

The veteran's statement of December 1, 1950, was a misrepresentation of a material fact which had

been knowingly made by the veteran with intent to deceive the defendant.

VIII.

Relying on the foregoing misrepresentations of the veteran, the defendant reinstated said insurance policy on December 4, 1950. Said action of the defendant in reinstating said policy was void in law and of no force and effect due to the fact it was based upon a misrepresentation of the veteran.

Wherefore, defendant prays for judgment as follows:

1. That judgment be rendered in favor of defendant and against the plaintiff dismissing plaintiff's Complaint;
2. That the defendant recover its costs;
3. That the defendant recover such further and additional relief as to the Court seems meet and just on the premises. [9]

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney,
Attorneys for Defendant.

Demand for Jury Trial

The defendant hereby demands a jury trial as to all issues triable as of right by jury in the within action.

Dated: This 16th day of June, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed June 16, 1955. [10]

[Title of District Court and Cause.]

PRETRIAL STIPULATION

Received in evidence as Defendant's Exhibit A

The parties, by and through their respective counsel hereto, submit the following Pretrial Stipulation regarding facts which are admitted and will require no further proof.

1. John R. Willoughby herein referred to as the veteran, entered the active military service in September, 1944, and was retired with the rank of Flight Officer in November, 1945, because of diabetes mellitus.

2. The veteran applied for and was issued National Service Life Insurance Policy No. N 17 587 396 in which he designated his mother Helen McCarthy Willoughby, the plaintiff herein, as the sole beneficiary.

3. On September 28, 1944, the veteran cancelled his prior designation and named the plaintiff as primary beneficiary and his wife, Edythe Rose Willoughby, as contingent beneficiary. This last designation of beneficiary was affirmed by the veteran [12] on August 21, 1950, at which time a lump sum mode of settlement of the insurance was selected.

4. Upon the veteran's retirement from the active military service, he was granted a hearing before the Army Retirement Board, a copy of which proceedings will be offered in evidence as Plaintiff's Exhibit A.

5. Following the original granting of insurance by the defendant to the veteran, the policy remained in effect on a premium paying basis to October 1, 1947, when it was declared by the VA to have lapsed for nonpayment of premium due on that date.

6. On July 12, 1948, the veteran executed a form, copy of which is attached hereto as Exhibit B entitled "Application for Reinstatement" which contains the following questions and answers:

Q. 8. "Are you now in as good health as you were on the due date of the first premium in default?"

A. "Yes."

Q. 9. "Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance?"

A. "No."

7. Said Reinstatement Application designated as Exhibit B was received by the Veterans Administration on July 13, 1948, and a sufficient amount having previously been tendered by the veteran to cover the payment of the premiums required for reinstatement on a comparative health basis, and the Application appearing regular on its face, the insurance was reinstated in accordance with established practice as of July 1, 1948. [13]

8. Premiums were paid on the reinstated insurance through November 30, 1949, and the insurance again was declared by VA to have lapsed for nonpayment of the premium due on December 1, 1949.

9. On February 6, 1950, the veteran executed another Reinstatement Application, a copy of which is attached hereto as Exhibit C. Included therein is a certification containing language similar to that in the certification appearing in his heretofore referred to Application dated July 12, 1948. The following questions and answers appear on this Application for Reinstatement:

Q. 10. "Are you now in as good health as you were on the due date of the first premium in default?"

A. "Yes."

Q. 11. "Have you been ill or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital or elsewhere, in regard to your health since the lapse of this insurance?"

A. "No."

10. This Application after being mailed by the veteran on February 8, 1950, together with a remittance in an amount sufficient to cover the premiums required for reinstatement on a comparative health basis was received by the Veterans Administration on February 9, 1950, and it appearing regular on its face, the insurance was reinstated as of February 1, 1950.

11. After February 9, 1950, the veteran paid premiums as they became due through August 31, 1950, when the insurance was declared by VA to have lapsed again for nonpayment of premium. [14]

12. The veteran was advised on October 3, 1950, by the Chief, Premium Accounting Division, of the Veterans Administration, Oakland District Office, that the insurance had lapsed, and that if he desired to continue his insurance, he might apply for reinstatement by applying for and signing a Reinstatement Application form.

13. On October 19, 1950, the nonmedical Reinstatement Application form, a copy of which is attached hereto as Exhibit D signed by the veteran was received by the Veterans Administration. This Application had been mailed October 18, 1950, with "August 30, 1950," being set forth as the date of the Application. The following questions and answers appear on this form:

Q. 10. "Are you now in as good health as you were on the due date of the first premium in default?"

A. "Yes."

Q. 11. "Have you been ill or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital or elsewhere, in regard to your health since the lapse of this insurance?"

A. "No."

14. On November 29, 1950, a letter was addressed to the veteran by the Chief, Premium Accounting Division of the Veterans Administration, Oakland District Office, in which the veteran was advised that since his Reinstatement Application bearing the date "August 30, 1950," was not mailed or otherwise delivered to the Veterans Administration within five days after said date, as required by the [1] pertinent regulations, it was necessary that he execute and return the Statement transmitted therewith in order that consideration might be given

the Application. The Statement was executed by the veteran on December 1, 1950, a copy of which is attached hereto as Exhibit E.

15. Following the receipt of the said Statement by the Veterans Administration on December 4, 1950, the insurance in question was reinstated and remittances were regularly tendered by the veteran on account of premiums until his death which occurred in the Veterans Administration Hospital, Fresno, California, on May 24, 1952.

16. On June 16, 1952, the plaintiff filed a formal claim for insurance benefits with the Veterans Administration.

17. Thereafter, the Disability Insurance Claims Division of the Veterans Administration, Denver District Office, made its determination determined on March 16, 1953, that the veteran had not been totally disabled for insurance purposes on July 12, 1948, or February 6, 1950, but that he had been so disabled on October 18, 1950, and thereafter on March 18, 1953, the Chief Medical Consultant, Underwriting Division, of said office, held that if the medical evidence currently of record had been disclosed when the various Reinstatement Applications were made, the Applications would have been medically rejected.

18. A formal decision was subsequently rendered by the Director of the Claims Service on May 14, 1953, wherein it was held that nothing was payable on account of the insurance because of the veteran's

misrepresentations as to the state of his health when he applied for reinstatement.

19. Plaintiff thereafter appealed to the Board of Veterans' Appeals the decision disallowing her claim and that Board denied her appeal by decision dated August 19, 1953. [16]

21. The insurance policy which is the subject of this action is in the amount of \$10,000 designated Certificate No. N 17 587 396 and is on the five year level premium term plan.

Dated: This 9th day of November, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. DAVIS,
Assistant U. S. Attorney,
Attorneys for Defendant.

/s/ ADOLPH FEIERBACH,
Attorney for Plaintiff. [17]



EXHIBIT C

Budget Bureau No. 70-2170
Approval expires 5-31-61.

VETERANS ADMINISTRATION APPLICATION FOR REINSTATEMENT (NONMEDICAL)

NATIONAL SERVICE LIFE INSURANCE FIVE-YEAR LEVEL PREMIUM TERM PLAN AND TOTAL DISABILITY INCOME PROVISION

(This form not to be used in connection with permanent plans of insurance)

DO NOT WRITE IN THIS SPACE
(For use of VA Index)

This form of application for reinstatement of lapsed level premium term insurance if physical examination is not made at time of application for reinstatement. Please type or use ink.

1. NAME—FIRST NAME—LAST NAME (Print or type)

JOHN R. WILLOUGHY

2. ADDRESS FOR INSURANCE PURPOSES (Number and street or rural route, city or P. O., zone number and state)

55 NORTH K STREET, TULARE, CALIFORNIA

3. KIND OF SERVICE (Check one)

☐ NAVY ☒ AIR FORCE ☐ MARINE CORPS

4. SERVICE SERIAL NO.

5. IT GUARD ☐ OTHER (Specify)

T-184054

2. POLICY NO(s). (If known)

FN-

N-1758-73-96

FV-

V-

FH-

H-

6. AMOUNT OF INSURANCE TO BE REINSTATED

1,000

7. DUE DATE OF PREMIUM IN DEFAULT

12-1-49

8. MONTHLY PREMIUM

\$ 6.00

9. AMOUNT TENDERED WITH THIS APPLICATION

\$ 27.00

10. AMOUNT OF TOTAL DISABILITY INCOME PROVISION TO BE REINSTATED

11. DUE DATE OF PREMIUM IN DEFAULT

12. MONTHLY PREMIUM

\$ 6.80

13. AMOUNT TENDERED WITH THIS APPLICATION

\$ 27.20

14. METHOD OF PAYMENT OF FUTURE PREMIUMS (Check one)

☐ DIRECT ALLOTMENT
☒ DIRECT REMITTANCE TO VETERANS ADMINISTRATION (Specify mode in item 9)

15. MODE (Monthly, quarterly, semiannually, or annually)

QUARTERLY

16. TOTAL MONTHLY PREMIUM

6.80

17. TOTAL AMOUNT TENDERED

\$ 27.20

18. DEDUCTION FROM VA COMPENSATION, PENSION, OR RETIREMENT PAY

COMPARATIVE HEALTH STATEMENT

I hereby apply for reinstatement of my National Service Life Insurance in the amount stated above. As a condition to the reinstatement of this insurance, I declare that the answers to the following questions are complete and true to the best of my knowledge and belief. I understand that statements made by me in this application are relied upon in reinstating insurance; that any deception or false statement either by inference, omission, or otherwise may result in cancellation of insurance or in refusal to pay a claim on the policy; and that, in either event, premiums are not returnable.

19. HAVE YOU EVER BEEN IN AS GOOD HEALTH AS WHEN YOU FIRST APPLIED FOR THIS INSURANCE?

20. WERE YOU ON THE DUE DATE OF YOUR FIRST PREMIUM IN DEFAULT?

21. HAVE YOU EVER BEEN ADMITTED TO OR CONTRACTED ANY DISEASE, INJURY, OR INFIRMITY, OR BEEN PREVENTED BY REASON THEREOF FROM ATTENDING YOUR REGULAR OCCUPATION, OR CONSULTED A PHYSICIAN, SURGEON, OR OTHER PRACTITIONER FOR MEDICAL ADVICE OR TREATMENT, IN HOME, HOSPITAL, OR ELSEWHERE, IN REGARD TO YOUR HEALTH SINCE THE LAPSE OF THIS INSURANCE?

22. IF YES, COMPLETE ITEM 23.

23. IF YES, ATTACH TO THIS APPLICATION A CERTIFICATE OF THE PHYSICIAN, SURGEON, OR OTHER PRACTITIONER, WITH DIAGNOSIS, PROGNOSIS, AND TREATMENT.

24. AMOUNT RECEIVED FROM COLLECTIONS DIVISION (If different from amount tendered, attach to this application a certificate of the Collections Div. is different from amount tendered)

25. AMOUNT RECEIVED FROM COLLECTIONS DIVISION (If different from amount tendered, attach to this application a certificate of the Collections Div. is different from amount tendered)

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EXHIBIT D

Budget Bureau Form 76-R174.
Approval expires 5-31-51.

VETERANS ADMINISTRATION
APPLICATION FOR REINSTATEMENT
(NONMEDICAL)

DO NOT WRITE IN THIS SPACE
(For use of VA Indus)

NATIONAL SERVICE LIFE INSURANCE
FIVE-YEAR LEVEL PREMIUM TERM PLAN
AND TOTAL DISABILITY INCOME PROVISION

(This form not to be used in connection with permanent plans of insurance)

Form of application for reinstatement of lapse level premium term insurance if physical examination is not
at time of application for reinstatement. Please type or use ink.

NAME (Middle Name - Last Name (Print or type))
John R. Willoughby
ADDRESS FOR INSURANCE PURPOSES (Number and street or rural route, city or P. O., zone number and
255 NORTH K STREET - Tulare Calif.

2. POLICY NO(S). (If known)
FN
N- **1758-73-96**
FV
VH
H-

3. SERVICE (Check one)
☐ NAVY ☒ AIR FORCE ☐ MARINE CORPS
☐ OTHER (Specify)

5. SERVICE SERIAL NO
T 184054

4. AMOUNT OF INSURANCE TO BE REINSTATED
10,000

DUE DATE OF PREMIUM IN DEFAULT
September 1, 1950

MONTHLY PREMIUM
6.80
AMOUNT TENDERED WITH THIS APPLICATION
20.42

6. AMOUNT OF TOTAL DISABILITY INCOME PROVISION TO BE REINSTATED

DUE DATE OF PREMIUM IN DEFAULT

MONTHLY PREMIUM
6.80
AMOUNT TENDERED WITH THIS APPLICATION
20.40

7. METHOD OF PAYMENT (Check one)
☒ DIRECT REIMBURSEMENT TO VETERANS ADMINISTRATION (Specify mode in item 9)
☐ BY CHECK
☐ BY MONEY ORDER
☐ BY CREDIT CARD
☐ BY OTHER (Specify)

8. MODE (Monthly, quarterly, semiannually, or annually)
quarterly

TOTAL MONTHLY PREMIUM
6.80
TOTAL AMOUNT TENDERED
20.40

COMPARATIVE HEALTH STATEMENT

I hereby apply for reinstatement of my National Service Life Insurance in the amount stated above. As a condition to the reinstatement of this insurance, I understand that statements made by me in this application are complete and true to the best of my knowledge and belief. I understand that statements made by me in this application are subject to the provisions of the policy and that in the event of a claim, the insurance company may require a medical examination or other evidence of health.

11. HAVE YOU BEEN ILL OR SUFFERED OR CONTRACTED ANY DISEASE, INJURY, OR INFIRMITY OR BEEN PREVENTED BY REASON THEREOF FROM ATTENDING YOUR USUAL OCCUPATION OR CONSULTED A PHYSICIAN, SURGEON, OR OTHER PRACTITIONER FOR MEDICAL ADVICE OR TREATMENT AT HOME, HOSPITAL OR ELSEWHERE, IN REGARD TO YOUR HEALTH SINCE THE LAPSE OF THIS INSURANCE?
☐ YES ☒ NO (If "yes," complete item 12)

12. IF YOU HAVE BEEN ILL OR SUFFERED OR CONTRACTED ANY DISEASE, INJURY, OR INFIRMITY OR BEEN PREVENTED BY REASON THEREOF FROM ATTENDING YOUR USUAL OCCUPATION OR CONSULTED A PHYSICIAN, SURGEON, OR OTHER PRACTITIONER FOR MEDICAL ADVICE OR TREATMENT AT HOME, HOSPITAL OR ELSEWHERE, IN REGARD TO YOUR HEALTH SINCE THE LAPSE OF THIS INSURANCE, ATTACH TO THIS APPLICATION A CERTIFICATE OF THE PHYSICIAN OR HOSPITAL WHERE TREATED, WITH DIAGNOSIS, PROGNOSIS, AND TREATMENT.

RECEIVED
OCT 10 1950

REINSTATED
NATL SER LIFE ACCT
PREMIUM ACCT NO DIVISION
DATE **10-10-50**

NOTED THAT:

- (a) An application must be accompanied by the order of at least two monthly premiums (no interest) or the amount of insurance to be reinstated, premium for the month of lapse (lapse period), and the premium for the premium month in which application is mailed or otherwise delivered to the Veterans Administration.
- (b) Acceptable reinstatement will be effective as of the premium due date immediately preceding the date this application is mailed or otherwise delivered to the Veterans Administration (except that when an acceptable application is mailed or otherwise delivered to the Veterans Administration on a premium due date, reinstatement will be effective as of that date).
- (c) Veterans Administration may require report of physical examination in connection with this application if deemed necessary.
- (d) A form must be fully completed and signed by me and mailed or otherwise delivered to the Veterans Administration immediately thereafter.
- (e) In order to prevent a subsequent lapse of this insurance, premiums must be paid each month as they become due while this application is receiving consideration. The next premium will be due and payable on the premium due date immediately following the date this application is mailed or otherwise delivered to the Veterans Administration.
- (f) Indebtedness against this insurance must be paid.
- (g) Checks, drafts, money orders, and postal notes should be drawn payable to the Treasurer of the United States and mailed to the Collections Unit, Veterans Administration office where my insurance records are maintained.
- (h) I am obligated to advise the Veterans Administration of any change of health condition arising after the date of execution of this form and prior to its being sent to the Veterans Administration.

14. DATE OF APPLICATION
10-10-50
15. SIGNATURE OF APPLICANT (Signature must be signed and dated)
John R. Willoughby

The law provides that whoever signs any statement or certificate, knowing it to be false, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year.



EXHIBIT E

9017

NOV 1950

Mr. John R. Willoughby

N 1758-73-06

I hereby certify that to the best of my knowledge and belief I was in as good health on October 18, 1950, as I was on September 1, 1950, the date of the first premium in default on my National Service Life Insurance account. Since the execution of the application, I have not been sick, or contracted any disease, or suffered any injury, or consulted a physician in regard to my health, or been prevented by reason of ill health or injury from attending my usual occupation, and that I am now in sound condition, mentally and physically, excepting as follows:

December 1, 1950
(Date)

John R. Willoughby
(Signature)

REINSTATED
NATL SER LIFE ACCT
PREMIUM ACCOUNTING DIVISION
John R. Willoughby

*Reviewed
12-17-1950
Schultz*

READY FOR FILE

DEC. 18 1950

RECORDED
NO. 100, 1000





[Title of District Court and Cause.]

ORDER FOR JUDGMENT

The above case came on for trial on February 9, 1956. The plaintiff was represented by Adolph Feierbach and the defendant was represented by Laughlin E. Waters, United States Attorney, Andrew J. Davis, Assistant United States Attorney, appearing. Following trial, briefs were submitted on behalf of the respective parties.

The complaint seeks a recovery in the sum of \$10,000.00 on a National Service Life Insurance policy issued by the United States. The defenses set forth in the answer allege that reinstatements of the policy were procured by fraudulent representations of the insured, and that the policy was and is null and void.

The veteran, John R. Willoughby, entered active military service in September, 1944, and was retired with the rank of Flight Officer in November, 1945, because of diabetes mellitus. He applied for and was issued National Service Life Insurance [22] Policy No. N-17587396, in which he designated his mother, the plaintiff herein, as the sole beneficiary. Later he designated the plaintiff as primary beneficiary and his wife as contingent beneficiary.

Following the original granting of insurance by the defendant to the veteran, the policy remained in effect on a premium-paying basis to October 1, 1947, when it lapsed for nonpayment of premium due on

that date. On July 12, 1948, the veteran made application for reinstatement which contained the following questions and answers:

Question 8: Are you now in as good health as you were on the due date of the first premium in default?

Answer: Yes.

Question 9: Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital or elsewhere, in regard to your health since lapse of this insurance?

Answer: No.

Question 10: Have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums?

Answer: Yes.

On the form of application, there was a space provided for the "C-number," in the event Question 10 should be answered "yes." A "C-number" indicates to the Veterans Administration a claim. This space was not completed on the application. The evidence establishes without conflict that the veteran had made application to the Veterans Administration for treatment on May 25, 1948, and that the requested [23] treatment was authorized to be administered by Dr. E. R. Schottstaedt, of Fresno, and that such treatment was furnished at the office of

the physician from May 18, 1948, through June 30, 1948. The following services were rendered, and the bill for the treatments was certified by Dr. Schottsteadt:

“Office visit May 18, 1948.

“Office visit May 25, 1948.

“Blood sugar test May 19, 1948, 71.9 mg per 100 cc.

“N.P.N test 30.1 mg%.

“Glucose Tolerance Test May 20, 1948.

“Urinalysis May 25, 1948.”

The medical report of the physician to the Veterans Administration contains the following remarks:

“Medical discharge from army because of diabetes. Hospitalized while in the service. Has 100% disability pension. Has insulin reactions. * * * Physical findings: ankle Oedema, insulin reactions; hyperglycemia; glycosuria, diabetes, improperly controlled. Treatment and progress: Medications with progress. Diet. Diagnosis: Diabetes mellitus * * Is further treatment required? Yes.”

The diagnosis of diabetes mellitus was the same as the diagnosis of the Army physicians at the time the veteran was retired in 1945. In the transcript of the proceedings held on October 2, 1945, page 2, this evidence was produced:

“Maj. Miller: Have you made a recent physical examination of Mr. Willoughby?

“A [by Capt. Fred E. Maisel, MC] I have, on 2 October, 1945, in conjunction with Major Kane.

“Maj. Miller: Did you have access to the complete medical history of Mr. Willoughby at the time you made your examination?

“A. I did. [24]

* * *

“Maj. Miller: Captain Maisel, will you please state the results of your examination of Flight Officer Willoughby?

“A. As a result of our examination, we arrived at a diagnosis of Diabetes Mellitus.

* * *

“Maj. Miller: Do you consider this condition to be permanent? A. I do.”

The application form for reinstatement contained the following statements or warnings:

“As a condition to the reinstatement of this insurance I certify that the answers to the following questions are complete and true to the best of my knowledge and belief.

“Penalty—‘Any person who shall knowingly make or cause to be made, or conspire, combine, aid or assist in, agree to, arrange for, or in anywise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such concerning any application for insurance or reinstatement thereof, waiver of premiums or claim for benefits under National Service Life Insurance for

himself or any other person, shall, upon conviction thereof be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or by both such fine and imprisonment.' (Section 615 of the National Service Life Insurance Act of 1940)."

Premiums were paid on the reinstated policy through November 30, 1949, and it again lapsed for nonpayment of premium due on December 1, 1949. On February 6, 1950, the veteran executed another reinstatement application. [25] Question 10 on this application was the same as question 8 on the prior application and the answer made by the veteran was in the affirmative. Question 11 on the application was the same as Question 9 on the prior application and the answer of the veteran was in the negative. This form did not contain a question similar to Question 10 appearing on the prior application.

The evidence shows that the veteran applied for treatment on December 15, 1949, to be administered by a private physician, Dr. C. E. Suits, of Visalia. The record of treatment given under this authorization by the Veterans Administration is as follows:

"Office consultations and laboratory examinations.

"December 10, 1949.

"December 14, 1949.

"December 19, 1949.

"December 21, 1949.

"December 27, 1949.

"December 31, 1949.

“January 13, 1950.

“January 28, 1950.

“Treatment for the condition: Diabetes with adjunct diarrhea and hypertension.”

In the form authorizing the treatment by Dr. Suits, and which also contains his report, there was a finding by the doctor that the veteran had suffered from “Diabetes for 5 years, swelling of ankles and feet, upset stomach, occasional nocturia and chronic diarrhea for 6 months.” The diagnosis was “Diabetes, chronic diarrhea, mild hypertension.”

In the deposition of Dr. Suits, page 15, is this:

“Q. This then, diabetes with the complications mentioned would be, definitely, a progressive type of disease?

“A. Yes, it follows that course, it is gradually downhill.”

In that deposition, page 16, the doctor stated: [26

“Q. In 1949, on occasion of his first visit to you, do you recall the condition of his eyesight at that time?

“A. * * * I am sure his eyesight got worse, and, as I remember, there was definitely trouble in one eye at the time. I don't remember which eye, but it was possible for him to see and get around all right. Toward the end he practically had to be led everywhere he went.”

Page 29 of the deposition:

“Q. In that, the original examination, you stated

you did, did you also find diabetes mellitus, is that correct? A. Yes.

“Q. Would that have been a continuing condition from 1945?

“A. Yes, you don’t get over diabetes.”

Page 31 of the deposition:

“Q. (By Mr. Feierbach): * * * How much was John Willoughby told by you concerning his condition during the course of treatment?

“A. I think he knew the whole story. I am sure that he was told that he had diabetes and that he had kidney trouble. His wife was definitely told that he would, that it was not a very good outlook and that life expectancy was not too long.

“Q. You say he was told he had diabetes?

“A. He knew that.

“Q. He knew that?

“A. Long before he came to see me.”

This form of application contained substantially the same warnings or statements that appeared on the prior application, with the additional statement:

“I understand that statements made by me in this application are relied upon in reinstating insurance; that any deception or false statement either by inference, [27] omission, or otherwise may result in cancellation of the insurance or in refusal to pay a claim on the policy; and in either event, premiums are not returnable.”

The policy was reinstated by the Veterans Administration without medical examination as of July 1,

1948, based upon the statements of the veteran in the application.

The reinstated policy again lapsed on August 31, 1950, for failure to pay premiums. On October 19, 1950, the veteran made application for reinstatement and the questions 10 and 11 were the same and the answers were the same as on the second application. The same warnings were likewise contained on this form.

Because the last application was dated August 30, 1950, the veteran certified to the Veterans Administration as follows:

“I hereby certify that to the best of my knowledge and belief I was in as good health on October 18, 1950, as I was on September 1, 1950, the date of the first premium in default on my National Service Life Insurance account. Since the execution of the application, I have not been sick, or contracted any disease, or suffered any injury, or consulted a physician in regard to my health, or been prevented by reason of ill health or injury, from attending my usual occupation, and that I am now in sound condition mentally and physically, excepting as follows: * *

/s/ “JOHN R. WILLOUGHBY.

“December 1, 1950.”

The policy was reinstated without medical examination as of December 18, 1950, based upon the statements of the veteran in the application and the certificate.

The evidence discloses that the veteran, between August 31, and October 19, 1950, had received treatment at the Veterans Hospital in Fresno, and that he had been in a hospital for examination and study on November 1, 1950, in San Francisco, California. [28]

At the time the insurance lapsed on September 1, 1950, the veteran was a patient in the Fresno Veterans Hospital, having been admitted there on August 7, 1950, following hospitalization in the University of California Hospital for diagnostic study on July 28, 1950. On August 9, 1950, a physical examination report of the veteran disclosed that there was almost complete loss of vision of the left eye and partial loss of vision of the right eye with retinitis. The amount of insulin the veteran had been taking was increased, and he was given two blood transfusions. After a month's stay in the hospital he was discharged on September 9, 1950, as having attained maximum hospital benefit, and with a diagnosis of diabetes mellitus, severe, and glomerular nephritis, chronic, severe with azotemia.

Although the veteran was actually a patient in the Veterans Hospital in Fresno from August 7, 1950, to September 9, 1950, the application for reinstatement states that it was signed at Tulare, California. For some reason, the application was not mailed until October 18, 1950, and on December 1, 1950, he submitted the comparative health statement as of the October 18th date, which contained this statement: I have not been * * * prevented by reason of ill health or injury from attending my usual occupation,

and that I am now in sound condition, mentally and physically * * *."

The evidence discloses that the veteran was intelligent, and had had experience in conducting his own roofing business. Nothing appears in the record to justify any inference that the veteran was unable to understand the questions appearing on the applications or that he was in any way confused by the questions or their arrangement on the application forms. From the uncontradicted evidence, there is no question that the answers given to question 9 on the first application, and [29] question 11 on the second and third applications, were false. The only inference that can be drawn is that the answers to question 8 on the first application, and to question 10 on the second and third applications were likewise false, since the medical reports establish that the disease pursued a progressive course resulting in death on May 24, 1952. The veteran knew the progressive nature of the disease.

The representations made by the veteran concerning the state of his health and treatments by physicians and by hospitals were false, so known to the veteran. These representations relate to material facts and it must be presumed from the evidence that the statements were made with intent to deceive. The only problem relates to the reliance upon such statements by the Veterans Administration in reinstating the policy, since all of the information above set forth concerning medical treatment and hospitalization was on file with the Veterans Administration, and

an examination of such files would have disclosed that the veteran's statements were false.

At the time of the first reinstatement of the policy the veteran in answering Question 10 stated that he had applied for disability compensation, retirement pay, pension or waiver of insurance premiums. The report of Dr. Schlottstadt was on file with the Veterans Administration at that time. An examination by the Veterans Administration would have disclosed the truth as to the veteran's condition. Likewise, on the second and third reinstatements, an examination of the files would have disclosed the reports of Dr. Schlottstadt and of the Veterans Administration at Fresno, California. [30]

The government argues that the Insurance Section of the Veterans Administration is maintained at Oakland, and that the Claims Section is maintained at San Francisco, California, and that the information in the San Francisco office was not available at the Oakland office. If the Insurance Section had followed up the answer given by the veteran to Question 10 on the first application, the falsity of the veteran's statements would have been disclosed. This Court is bound by the language of the Court of Appeals in the Ninth Circuit in the case of *United States v. Kelley*, 136 F 2d 823. In the Kelley case, the veteran applying for government life insurance, made the following answers to Question 13 on the application:

13. Have you ever applied for (a) government insurance * * *? Ans. No. * * * (d) Pension? Ans.

Apparently someone in the "Insurance Section" had endorsed the "C-number" on the application. In the instant case, the veteran correctly answered Question 10 on the first application. In disposing of the government's contentions in the Kelley case, the Court stated at page 825 et seq. as follows:

"The evidence showed that both of Kelley's applications—his application for compensation and his application for insurance—were made to and acted upon by the Veterans Administration. With respect to such applications, the Veterans Administration was and is the agent of appellant. *United States v. Golden*, 10 Cir. 34 F 2d 367, 376. The evidence showed that, as such agent, the Veterans Administration received, considered and acted upon Kelley's application for compensation before receiving his application for insurance. Thus the evidence showed that appellant, by its agent, had full knowledge of the application for compensation, and, with such knowledge, granted the insurance. Therefore the evidence did not warrant, much less require, a finding that appellant relied upon or was deceived by the answer to question 13(a). [31]

"There is here no question of imputing to the Veterans Administration knowledge which it might have been able to obtain from the records of another Department of the Government. Kelley's application for compensation was a part of the Administration's own records. Its knowledge thereof was actual, not imputed, knowledge. Hence such cases as *United States v. Riggins*, 9 Circuit, 65 F 2d 750; *United*

States v. Depew, 10 Cir., 100 F 2d 725; and *Jones v. United States*, 5 Cir., 106 F 2d 888, cited by appellant, have no relevancy here.

“Appellant argues that Kelley’s application for insurance was considered and acted upon by the ‘insurance section’ of the Veterans Administration; that the ‘insurance section’ had no knowledge of Kelley’s application for compensation; and that therefore appellant could disclaim such knowledge. Cf. *Halverson v. United States*, 7 Cir., 121 F 2d 420, 422. The argument assumes that the ‘insurance section’ and the Veterans Administration are separate entities, and that, with respect to Kelley’s application for insurance, the ‘insurance section’ was appellant’s agent. These assumptions are unwarranted. The ‘insurance section’ of the Veterans Administration is not a separate entity, but is merely a function or activity of the Administration. Appellant’s agent was not the ‘insurance section’ of the Administration, but was the Administration itself.”

On motion to amend the opinion rendered by the court in the Kelley case, Chief Judge Denman, concurring in the denial of such motion, stated:

“The appellant moves a modification of the opinion’s holding that the Veterans Administration had notice of the filing of a claim for compensation by the appellee. Appellant urges that it cannot be charged with such notice because of the administrative difficulty in examining its files in the compensation section to determine whether the applicant had correctly answered question 13(a).

“There should be no such administrative difficulty if the files are properly kept. If they are not, such failure should not prejudice the veteran’s widow any more than it would prejudice the veteran’s widow suing the Equitable Life Insurance Company with a vastly greater volume of life insurance and compensation business than that of the Veterans Administration. If properly indexed it would not [32] take an hour’s search of the files to determine whether a compensation claim had been filed. One can imagine the short shrift we would give to a similar plea of the Equitable Life if the question had been whether the insured under a life policy had filed with that company a claim for compensation for total disability.”

This Court is constrained, under the language of the Kelley case, to hold that the government was not warranted in relying on the false statements contained in the applications for reinstatement, when the files of the Veterans Administration contain the true information.

Were it not for the Kelley case, this Court would adopt the reasoning contained in the decision of the Circuit Court of Appeals of the District of Columbia in the case of *United States v. Kieffer*, 228 F 2d 44, 1956, and would uphold the defenses of fraud set forth in the answer of the government.

Judgment is ordered for the plaintiff in accordance with the prayer of her complaint, and counsel for the

plaintiff is directed to lodge with the Clerk of this Court findings of fact, conclusions of law and form of judgment, not inconsistent with the views herein expressed.

The Clerk of this court is directed to forthwith mail copies of this order and memorandum to counsel for the parties.

/s/ GILBERT H. JERTBERG.

Dated: July 31, 1956.

[Endorsed]: Filed July 31, 1956. [33]

United States District Court, Southern District
of California, Northern Division

No. 1448-ND

HELEN McCARTHY WILLOUGHBY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above-entitled action came on for trial before the Court, sitting without a jury, the plaintiff appearing in person and by her attorney, Adolph

Feierbach, Esq., of Visalia, California, and the defendant appearing by its attorney, Andrew J. Davis, Esq., of Los Angeles, California, Assistant U. S. Attorney, representing Laughlin E. Waters, Esq., United States Attorney for the Southern District of California, and evidence both oral and documentary having been introduced and received by the Court, and said matter having been argued before the Court both orally and by written briefs and thereafter submitted to the Court for its decision, and the Court being fully advised in the premises, makes these, its

Findings of Fact

I.

That the defendant, on or about September 1, 1944, duly issued to one John R. Willoughby, a member of the Armed Forces of [34] the United States, to whom was assigned Serial Number T184-054, a policy of Life Insurance in the principal sum of ten thousand and no/100 (\$10,000.00) dollars, being National Service Life Insurance Policy number 17,587,396, in which the plaintiff above named was designated as sole beneficiary.

II.

That on September 28th, 1944, said John R. Willoughby cancelled said designation of beneficiary and executed a new designation naming plaintiff as primary beneficiary and the wife of said John R. Willoughby as secondary beneficiary

III.

That all premiums required to be paid under the terms of said policy between the date of issuance thereof, and the date of death of said John R. Willoughby were paid and received by defendant.

IV.

That said John R. Willoughby was retired with the rank of Flight Officer in November, 1945, on account of illness, to wit, diabetes mellitus; that the Army Retiring Board found that said John R. Willoughby was incapacitated for active service and that said incapacity was the result of an incident of service, namely diabetes mellitus.

V.

That said John R. Willoughby died at the Veteran's Hospital, Fresno, California, on May 12, 1952, as a result of the progression of said disease, diabetes mellitus; that said hospital was and is maintained by an agency of defendant, to wit, the Veterans' Administration.

VI.

That the primary beneficiary, namely Helen McCarthy Willoughby, plaintiff herein and mother of John R. Willoughby, survived him and made due application, on or about October 15, 1952, to said Veterans' Administration for payment to her of the [35] proceeds of said policy of life insurance; that on or about March 25, 1953, said Veterans' Administration denied plaintiff's claim and refused to pay said proceeds; that thereafter plaintiff ap-

pealed said decision to the Veterans' Board of Appeals, and on August 19, 1953, said appeal was denied.

VII.

That said insurance policy lapsed for non-payment of premiums on each of the following dates:

- (1) October 1, 1947.
- (2) December 1, 1949.
- (3) September 1, 1950.

That as to each of said lapses, said John R. Willoughby made applications for reinstatement without medical examination, upon the following dates

- (1) July 12, 1948 (as to lapse of October 1, 1947).
- (2) February 6, 1950 (as to lapse of December, 1949).
- (3) October 19, 1950 (as to lapse of September 1, 1950).

and in each of said applications and in a supplementary certificate dated December 1, 1950, the said John R. Willoughby represented (a) that he was in as good health as he was on the due date of the first premium in default, (b) that he had not been ill, or suffered or contracted any disease, injury or infirmity, or been prevented by reason thereof from attending his usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital or elsewhere, in regard to his health since lapse of said insurance. That each and all of said applica-

tions for reinstatement were granted by the said Veteran's Administration, and said policy was, at the time of his death so reinstated with premiums paid to date.

VIII.

That each and all of said representations set forth in the preceeding paragraph (designated (a) and (b)) were untrue, and known by said John R. Willoughby to be untrue, and they and each of them were material facts; that it must be presumed they were made [36] with intent to deceive.

IX.

That in his application for reinstatement, made July 12, 1948, said John R. Willoughby answered in the affirmative, the following question: "Have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premium?" being question numbered 10, therein.

That an investigation of this answer in his said application by defendant's agent would have revealed the true state of the veteran's health.

That it is further true that said John R. Willoughby made written application to the said Veterans' Administration on May 25th, 1948, for medical treatment, which was granted, and he received such treatment, at the expense of the Veterans' Administration (for diabetes mellitus) from May 18th, 1948, through June 30, 1948, and from the time to time thereafter, up until the time of his death; that the records of said application for disa-

ability compensation, etc., and of the disability and illness of John R. Willoughby, and the treatment thereof by physicians authorized by the Veterans Administration to administer it, were on file with the Veterans' Administration at the time of receipt by them of each of said applications for reinstatement.

X.

That the true facts concerning the state of health and medical treatment of said John R. Willoughby were known to said Veterans' Administration at the time of granting each of said applications for reinstatement, and the Court finds therefore that the action taken by said Veterans' Administration in granting the same was not taken in reliance upon the said false representations; that in acting upon said applications, the said Veterans' Administration was at all times acting as the agent of the defendant herein; that the defendant granted said applications with actual [37] knowledge of his condition of health and that he was under treatment therefore by physicians, said information being part of the records of defendant's agent.

XI.

That the Veterans' Administration is one agency and is not separated into separate entities; that the "Insurance Section" and "Claims Section" of said Veterans' Administration are functions of the same agency, to wit: of Veterans' Administration and the notice to our knowledge of one of said "sections"

is notice to and knowledge of said Veterans' Administration.

XII.

That Adolph Feierbach, Esq., attorney for plaintiff, has performed services in the prosecution of plaintiff's claim having the reasonable value of ten per cent (10%) of the amount of her recovery.

Conclusions of Law

I.

The Veteran's Administration, at all times described in the foregoing findings of fact, was the agent of the defendant, The United States of America. (United States vs. Golden, 10 Cir. 34 F 2d, 367,376.)

II.

That the defendant, by its said agent, had actual knowledge of the true information concerning the state of health of said John R. Willoughby, deceased, at the time of acting upon and granting his said applications for reinstatement of his policy of National Service Life Insurance and it did not rely upon the false representations of the veteran, John R. Willoughby, in reinstating his insurance. (United States vs. Kelley, 136 F 2nd 823.)

III.

That National Service Life Insurance Policy Number 17,587,396, in the principal sum of Ten Thousand (\$10,000.00) Dollars written upon the life of John R. Willoughby, Deceased, was [38] in full force and effect at the time of his death on May 12,

1952, and the proceeds thereof were then and there due and payable to his primary beneficiary, Helen McCarthy Willoughby, plaintiff herein.

IV.

That the attorney for plaintiff, Adolph Feierbach Esq., of Visalia, California, is entitled to a fee of ten per cent (10%) of the amount recoverable by plaintiff, and to be paid direct to him by the Veterans' Administration out of the sums awarded to plaintiff. (38 U.S.C.A. 551, Taylor vs. U. S., 115 Fed. Sup. 143,153.)

V.

That plaintiff herein is entitled to judgment against the defendant for the principal sum of ten thousand (\$10,000.00) dollars.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is ordered, adjudged and decreed:

1. That plaintiff herein, Helen McCarthy Willoughby, do have and recover of and from the defendant, the United States of America, the sum of ten thousand (\$10,000.00) dollars.

That out of said sum payable to plaintiff, there be paid direct to Adolph Feierbach, Esq., Attorney at Law, Visalia, California, and deducted from the sum payable to plaintiff, ten per centum (10%) thereof.

Dated: November 16th, 1956.

/s/ GILBERT H. JERTBERG,
United States District Judge.

Lodged November 15, 1956.

[Endorsed]: Filed November 16, 1956.

Docketed and entered November 21, 1956. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the defendant,
United States of America, hereby appeals to the
United States Court of Appeals for the Ninth
Circuit from the final judgment entered in this
case on November 21, 1956.

Dated: January 16, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ HIRAM W. KWAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 16, 1957. [41]

In the United States District Court, Southern
District, of California, Northern Division

No. 1448-ND-Civil

HELEN McCARTHY WILLOUGHBY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Gilbert H. Jertberg, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

February 9, 1956

Appearances of Counsel:

For the Plaintiff:

ADOLPH FEIERBACH.

For the Defendant:

LAUGHLIN E. WATERS,

United States Attorney, by

ANDREW J. DAVIS,

Assistant United States Attorney.

HELEN McCARTHY WILLOUGHBY

the plaintiff, called as a witness and having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Feierbach: [4*]

* * *

Q. Will the Clerk show the witness Government's Exhibit B?

A. Yes, I am acquainted with this form. [11]

Q. And that is a form for application for reinstatement?

A. Nonmedical.

Q. Do you know the procedure whereby those forms were received by the Veterans Administration?

A. Yes.

Q. And can you describe that?

A. This form was received in the premium accounting section, and went directly to the accounting clerk that handled the insurance records for this number, I should say the premium accounting records for this number, and if the application was answered yes and no to questions 10 and 11, and the emittance was sufficient to reinstate the insurance, and it was signed by the applicant, and there was nothing irregular on its face, the clerk would reinstate the insurance, stamp this form "reinstated" and send it to file, and then send a release to the insured.

(Testimony of Helen McCarthy Willoughby.)

Q. Did the Veterans Administration send the unexecuted form to the insured?

A. Yes. We were responsible for releasing this form to the insured if insurance had lapsed.

Q. Can you describe the procedure whereby one of these forms would be sent to an insured person?

The Court: Well, are you referring now to the application?

Mr. Davis: To the application for [12] reinstatement.

A. Once a month we had the clerks scan their accounts, and any account in which a remittance had not been received during that month and which was due, they would certify those records and prepare the letters to the insured.

The Court: And did you enclose a form of application to reinstate?

The Witness: That is right, we attached this form 353-a.

The Court: In duplicate?

The Witness: No, we only attached the one copy and we noted in our records that we had sent out the notice.

The Court: And then if the application was regular on its face, as you have indicated, you would stamp, or somebody would stamp "reinstated," is that correct?

The Witness: That is correct.

The Court: Then what, if anything, in that remained a part of the files of the section? Is that right?

(Testimony of Helen McCarthy Willoughby.)

The Witness: That is right, it went to the insurance file in our section. [13]

* * *

DR. MANIFEE McDONALD

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

by Mr. Davis: [15]

* * *

Q. Doctor, are you acquainted and have you studied the disease known as diabetes mellitus?

A. I have, yes.

Q. And how does one become afflicted with that disease?

A. The answer to that is unknown. It is not known what, except in unusual cases—the usual cases of diabetes, the cause of it is not known.

Q. Is it a hereditary type of disease?

A. Heredity is involved in its appearance in my [16] particular patient, yes.

Q. Do individuals in any particular occupation acquire diabetes mellitus?

A. No. It is not an occupational—occupation doesn't represent a hazard.

* * *

(Testimony of Dr. Manifee McDonald.)

Cross-Examination

By Mr. Feierbach: [17]

* * *

The Court: Doctor, for the record, will you explain in layman's language what you mean by diabetes and what you mean by mellitus?

The Witness: Well, there are two diseases labeled with the general term diabetes. Diabetes means sweet urine. In one kind, which we are not dealing with, it is a disease in which very large amounts of urine are passed; it is quite [21] rare. The type we are speaking about—no, wait a minute, let me back up a little. Diabetes means much urine. Diabetes insipidus is weak urine, or a lot of urine. That is the end of that one.

Diabetes mellitus is sweet urine, sugar in the urine. It is classed as a metabolic disease in that the disease is a disorder of the metabolism involving primarily the sugars or carbohydrates in the body, secondarily involving the other things we eat, protein and fat. The disease manifests itself as an abnormal elevation of the blood sugar with secondary spillage of sugar into the urine. The body cannot handle sugars correctly, they are lost, other foods must take their place, take the place of sugar, and the secondary bad effects are due to abnormal metabolism, to try to make up for this defect. It is a difficult disease to define, because, as I say, we don't know its cause. Its effects are felt in many

(Testimony of Dr. Manifee McDonald.)

places in the body. Ten years ago it was a simple disease to find, but we know a little more about it and we don't know as much as we thought we did.

The Court: And does it, if not corrected, produce this degeneration you mentioned, other disorders?

The Witness: Yes. Now we are getting into the field of disagreement among doctors, your Honor. Some of these degenerative disorders come on—some doctors say these degenerative disorders come on no matter how well the patient [22] is treated, it still depends on the particular patient. We can't say for sure. Other doctors, who are authorities in the field, who have devoted their lives to the subject, strongly believe and write and say in loud voices that there will be a minimum or none of these degenerative disorders in a patient who is well controlled as far as the diabetes goes, that is, no sugar spilling most of the time, for twenty or thirty years. The arguments are not settled.

The Court: Well, I have known many people over the years, I think, who have been on some sort of insulin treatment and diet and they have gotten along very well for a period of many years.

The Witness: That is very true. Insulin is used in most diabetes in addition to the diet to help control, to help level off this flood sugar at a normal or near normal level. [23]

JOHN J. McDONAGH

called as a witness by the defendant, having been first duly sworn, was examined and testified as follows: [26]

* * *

Direct Examination

By Mr. Davis:

* * *

Q. Was Mr. Willoughby a patient at the hospital?

A. Yes, he was. Our records show Mr. Willoughby was admitted to the Veterans Administration Hospital, Fresno, California, on August 7, 1950, at 9:30 a.m., and was discharged on September 9, 1950. [27]

* * *

The Witness: 9th. He was readmitted again May 21, 1952, and expired May 24, 1952. There are no other admissions to this hospital.

Q. (By Mr. Davis): He was continuously a patient in your hospital, or at the hospital from August 7, 1950, to September 9, 1950?

A. For a period of 33 days, yes, sir. I believe there was no leave or pass given that I know of.

Q. Does your record show what type of treatment he received? A. Yes, sir, it does. [28]

* * *

Q. Is there any summary of the treatment he received?

A. Yes, there is a summary on the first period

(Testimony of John J. McDonagh.)

of hospitalization, which is made on all the patients, which is called a discharge or narrative summary, and there is also a summary covering the entries of the hospital.

Q. Would you read for the record the summary for the first period of hospitalization?

A. This summary is broken down into several parts. First, is "Present illness: This patient was admitted to this hospital with the following complaints, loss of energy, weakness, loss of vision left eye, partial loss of vision right eye. While in service in 1946 he became tired, weak and thirsty. [29] He reported to the flight surgeon and found that he had diabetes. He was hospitalized at DeWitt General Hospital for two months and retired from the Army. About one year ago, he was fairly well controlled and he became more fatigued, his ankles and legs began to swell, and his diabetes became harder to control. For the past six months, he has been under the care of a general practitioner, and inasmuch as his albumin remained 4 plus all the time and his blood sugar high, and inasmuch as he had retinal hemorrhages with loss of vision in the left eye, and inasmuch as he had a hemoglobin of 25 to 50, he was sent to the University of California Hospital where he remained for diagnosis. He was admitted to the University of California Hospital July 28, 1950, for diagnostic study. At the UC Hospital, the patient was found to have a high glucose tolerance. The fundi showed large recent and old hemorrhages and punctate hemorrhages of

(Testimony of John J. McDonagh.)

both retinae. He was found—and there are stricken two words, to have—on urine examination, to have a fixed urine specific gravity, excretion of 8 grams of albumin and 61,000,000 red blood cells a day with occasional hyaline casts. The PSB excretion was 13% in 13¼ hours. The NPN was 71.5.”

The next paragraph is entitled: “Physical Examination: This 31-year-old ex-pilot, a present roofing contractor, was examined on August 9, 1950. Height, 72½. Weight, 158. [30] Blood pressure, 160/90. Patient appears slightly pale and asthenic. He is fairly intelligent and understands his medical problem. Examination of the eyes revealed practically complete loss of vision in the left eye, marked retinitis. Partial loss of vision of right eye with retinitis, also. Examination of the heart and lungs was normal. Palpation and hammer percussion over both kidneys elicits no tenderness.”

The next paragraph is entitled: “Laboratory and X-Ray Findings: Urinalysis: Specific gravity, 10.5. Albumin, 4 plus. Field covered with a morphourates—8-8-50. 8-22-50, specific gravity, 10.6. Albumin, 3 plus. Microscopic: Many bacteria in morpous material, occasional red blood cells. 8-8-50, blood sugar 270 mgms. per 100. NPN 88½ mgms. per 100. 8-11-50, total protein, 8.6 grams per 100. 8-22-50, NPN, 108. Hematology: 8-8-50, white count, 10,250. Red count, 3,190,000. 8-22-50, white count, 10,150. Red count, 3,890,000. X-ray of the chest was clear.”

The next paragraph is entitled: “Course in the Hospital: The patient”—then there are six words

(Testimony of John J. McDonagh.)

deleted in ink which are, was put on insulin, or, rather—"was continued on his insulin, similar to the treatment received at the University of California Hospital. He was given 15 units of insulin before meals. This was varied, according to the results of urinalysis, being increased to 20 or 25 before meals. Two transfusions of 500 cc whole blood each were given during [31] the patient's stay at the hospital. The patient was put on a low salt diet of 2,400 calories. Patient was given seconal when necessary for sedation. After the patient's stay in the hospital for about a month, his diabetes was fairly well controlled. The patient was more comfortable and had very few complaints. Inasmuch as no further treatment was indicated, the patient was recommended for discharge."

Then we have following that several short paragraphs. "Discharge Status: MHB. Discharge medication: None. Follow-up: None.

"Diagnoses: 1. Diabetes, Mellitus, severe.

"Diagnoses: 2. Glomerulus nephritis"—it is two words here—"chronic, severe; with azotemia.

Service-connected status: Unchanged. This examination was not for rating purposes." [32]

* * *

Cross-Examination

By Mr. Feierbach:

* * *

Q. Just one question before you start to read: These are records of the Veterans Administration,

(Testimony of John J. McDonagh.)

are they not? [33] A. Yes, they are.

Q. The total records of the Administration?

A. Yes, these are retained, however, at our hospital.

Q. You are going to read it?

A. This summary is for the second period of hospitalization, entitled "Narrative Summary"—no, "Final Summary."

Date of admission, 5-21-52. Date of discharge, 5-24-52 (Died). Number of days hospitalized 3.

First paragraph under the heading of "present Illness: This 33-year-old white male adult, a known case of diabetes for six years and chronic nephritis for about three years, was admitted on 5-21-52 with symptoms of advancing anemia and progressive deterioration in his general condition for the past three months. Diabetes mellitus dates back to 1946 while in the service. He has been taking insulin for this since, more recently in three doses daily. 2½ years ago following the onset of fatigability, pedal edema and blindness, he was hospitalized at the University of California Hospital where urinalyses revealed specific gravity to be fixed, quantitative albumin excretion 8 grams in a day, and Addis count 61 million red cells with occasional hyaline casts. PSP excretion was 13% in two hours. NPN was 71.5. They felt that he was a case of chronic glomerulonephritis with severe renal failure as well as diabetes mellitus. He was hospitalized here during the summer of 1950. Blood [34] pressure at

(Testimony of John J. McDonagh.)

that time was 160/90. He was somewhat pale. Heart and lungs were not remarkable. NPN varied from 88 to 108. Red count was from 3,190,000 to 3,890,000. Chest X-ray was negative. Urine showed fixed specific gravity with 3 plus albumin. Blood sugar was 270. Microscopic urinalysis revealed occasional red blood cells. He received two blood transfusions here and was treated with a low salt diet. Insulin was given three times daily before meals, usually 15 units per dose. Following his discharge here, he was cared for by his local physician receiving liver injections, iron, vitamin preparations in an attempt to control his anemia. There was gradual improvement to December of 1951 when he was feeling somewhat stronger. His blood pressure was said to be normal at that time. He received a transfusion in March, 1951, and again in June, 1951.

"In February, 1952, patient developed symptoms of influenza, was hospitalized and received two blood transfusions as well as antibiotics. He recovered somewhat but after leaving the hospital, his condition has gradually deteriorated to the time of admission. During the three weeks before admission, this was particularly noticeable. Symptoms included nausea, frequent vomiting, intermittently poor appetite, loss of strength, fatigability, weakness, and insomnia. He stayed on a low salt diet. He stated that there was development of mild edema of his extremities on prolonged [35] standing with rapid diminution on reclining. He has also complained of occasional irregular heart action with

(Testimony of John J. McDonagh.)

palpitation and skipped beats. This is a relatively new symptom, during the past several weeks. System review and past history revealed no significant nocturia, moderate exertional dyspnea probably related more to the status of his hemograph, nocturnal dyspnea for the past three weeks though not severe. He has received no digitalis or mercurial diuretics in the past. Two years ago he became blind in the right eye and developed poor vision in his left eye. These occurred suddenly following retinal thromboses. There is a history of hives during childhood and more recently he has been told he had hay fever."

The next paragraph is entitled "Physical Examination: Revealed a well-developed, well-nourished, young, white, male adult who is conscious, co-operative and rational and who appeared acutely and chronically ill. He is well oriented, appeared extremely intelligent and had good grasp of memory. There was no apparent dyspnea, orthopnea, cyanosis, edema or petechiae. The pertinent physical findings included minimal neck vein distention, both pupils regular, the right slightly greater than the left, and the right not reacting well to light. Conjunctivae showed 3 plus pallor. Lung fields were clear. The heart appeared somewhat enlarged to the left. The PMI was felt midway between the [36] mid clavicular and anterior axillary line in the 5th left intercostal space. On admission the heart was irregular with a moderate pulse deficit of some 20 beats. The following morning, heart rate and

(Testimony of John J. McDonagh.)

rhythm were regular at 110 per minute. Blood pressure was 145/88. There was a Grade I soft systolic murmur at the apex. The abdomen was negative. Neurological examination was not remarkable. The remainder of the physical examination was within normal limits."

The next paragraph is entitled "Laboratory Work: Admission urines revealed on two occasions, specific gravity 1005, albumin 4 plus, and 2 plus, and urines for sugar were negative. Microscopic examination of the urines revealed on 1 occasion many granular casts, 50 WBC, and 5-10 RBC. On the 2nd occasion, essentially the same findings. Red counts 2,110,000, hematocrit 20, sedimentation rate 14 corrected. White count 10,350 with polys 73%. NPN was 77 mg. %."

The next paragraph is entitled "Tentative Diagnosis: Chronic glomerulonephritis."

The next paragraph is entitled "Course in Hospital: Patient was in the hospital 3 days before expiration. It was felt that the patient represented a rather advanced stage of chronic glomerulonephritis but that his anemia was probably responsible for much of the symptomatology at [37] this time. It was, therefore, decided to transfuse the patient. The first day in the hospital, the patient received the same insulin dosage he had been taking on the outside, namely, 15 units, 10 units, and 10 units of regular insulin before the three meals. He had slight insulin reaction in the late afternoon of the 1st day and the insulin dosage was then cut to

(Testimony of John J. McDonagh.)

5 units before each meal from there on. On the 2nd hospital day, the patient received 500 cc of blood by transfusion. About an hour after the end of the transfusion he complained of some tightness in his chest with some difficult respirations. Six minims of epinephrine relieved this fairly well. EKG revealed sinus tachycardia and left ventricular hypertrophy. Early in the morning of 5-24-52, patient became quite dyspneic, pulse became poor and weak, and skin became cold and moist. Patient complained of constricting feeling about the chest. Emergency EKG revealed ventricular tachycardia. Blood pressure was unobtainable. Pronestyl intravenously in the dose of 600 mg. total over a period of about 40 minutes was ineffectual in halting this arrhythmia and patient was pronounced dead at 7:45 a.m., 5-24-52. A post-mortem examination was done.

“Diagnosis: 1. Diabetes mellitus, treated, died. 2. Chronic glomerulonephritis, treated, died. 3. Arteriosclerotic heart disease, treated, [38] died. 4. Infarction of myocardium due to arteriosclerotic coronary thrombosis manifested by ventricular paroxysmal tachycardia.”

Diagnosis No. 5, which has been deleted in ink, “Hypertensive cardiovascular disease secondary to dg. No. 2.” [39]

WILLIAM G. DENARDO

a witness for the defendant, having been previously duly sworn, resumed the stand, and was examined and testified further as follows:

* * *

Direct Examination
(Continued)

By Mr. Davis:

Q. Mr. Denardo, I am going to show you Plaintiff's Exhibit I, and ask you if you are familiar with the type of form, which appears photostated thereon? A. Yes, I am.

Q. And did your section regularly handle that type of form? A. Yes.

Q. And can you describe what it is and what it was used for?

A. This is what we call the premium record card, on which we posted all remittances received for the insurance, and it indicated the status of the insurance.

Q. When premiums were paid, it would be posted on these cards?

A. That is right. There is a column here, "Last month [40] paid," and we would post remittances and show the last month for which it was paid.

Q. Now, those cards there show which insured the cards refer to?

A. Well, this record is for John R. Willoughby, Number 17587396.

(Testimony of William G. Denardo.)

Q. From those cards can you tell if Mr. Wiloughby's insurance lapsed at any time?

A. Yes.

Q. And did it lapse more than once?

A. Yes, reading this card it lapsed three times.

Q. What was the first lapse?

A. The first time it lapsed was November, 1949, nonpayment of premium. Excuse me.

Q. Is that the second time, or the first time?

A. No, the first time it lapsed was September, 1947, nonpayment of premium.

Q. Was it reinstated on that occasion?

A. It was reinstated, nonmedical reinstatement, July 12, 1948.

Q. What is the next lapse that appears in the record?

A. The insurance was paid to November, 1949, when it lapsed for nonpayment of premium.

Q. Was the insurance reinstated on that occasion?

A. Yes, it was reinstated with a nonmedical reinstatement [41] form 353 on February 8, 1950.

Q. What was the next lapse?

A. The next lapse was August, 1950.

Q. Was it thereafter reinstated?

A. Yes, it was reinstated with a nonmedical reinstatement form on October 15, 1950.

Mr. Davis: May I see Defendant's F, G, H?

The Court: Was there a period of a year in which the policy could be reinstated for nonpayment of premium?

(Testimony of William G. Denardo.)

The Witness: Well, at the time the policy could be reinstated, there was no limitation.

The Court: In other words, if the policy had lapsed for nonpayment of premium and that covered a two-year period, or three, the veteran could make application and forward the proper premiums covering that period, then on the nonmedical reinstatement it would be reinstated, is that right?

The Witness: That is right, and subsequently, and I don't know at which date it changed, that rule only applied for a 90-day period, but for a certain period of time there was no limit. That was immediately after the war, but after things were organized it was changed back to the 90-day period.

The Court: Yes, but these reinstatements were all made within that 90-day period, I assume? [42]

The Witness: Well, the first one wasn't, but the second one was, and the third was within the 90-day period.

Q. (By Mr. Davis): Mr. Denardo, I show you Defendant's Exhibits B, C, D and E. You have testified this morning with reference to Exhibit D, I believe, is that correct? A. That is correct.

Q. The Exhibits B and C also represent reinstatement application forms, and were those handled the same as was the procedure when Exhibit D was being processed? A. Yes.

Q. Now, you testified this morning that if the documents appeared regular and the proper answers appeared on the face of the reinstatement ap-

(Testimony of William G. Denardo.)

plication, the clerk stamped the application reinstated, is that correct? A. Yes.

Q. What was the procedure if the question relating to comparable health and visits to physicians and hospital were answered which would indicate the comparative health was not as good or that the veteran had visited a doctor or physician?

A. Well, the premium review clerks in my section were not authorized to handle such reinstatement, and they would send them with the insurance file to the insurance medical section for processing, and then if it [43] was approved, it would be returned to the premium review clerk for handling.

Q. Your section then was only authorized to reinstate if the answers appeared in regular form?

A. Yes and no to the two questions. Any variation of that, or any statement under that illness block, why, we would have to recheck them.

Q. At that time you would send it to a different section, the insurance section?

A. Insurance medical section.

Q. Medical. And you are not acquainted with the procedure in that section?

A. No, that was a different division.

Q. Thereafter if the form was returned to you from the medical section, what would appear stamped on the form?

A. Well, it would come back either stamped "acceptable" and it was signed by one of the doctors, or one of the members, I should say, of the medical section; or they had a covering form that they

(Testimony of William G. Denardo.)

would attach to the reinstatement, advising we could reinstate; or, thirdly, it would be stamped "rejected" or a word similar to that, they did not accept it.

Q. Did you review the insurance folder contained in the Veteran's file this morning?

A. Yes, sir.

Q. And was there any medical evidence or information [44] contained in that portion of the file?

A. Not in the insurance portion of the file. [45]

* * *

Q. Mr. Denardo, I am going to show you Government's Exhibit J, and ask you if you recognize the document?

A. Yes, I do.

Q. Would you state what it is?

A. This is the operating manual for the premium accounts unit.

Q. And that covered your section, did it, of the Veterans Administration?

A. This covered some of the units of my section.

Q. Did that provide for the procedure to be followed in processing reinstatement applications?

A. Yes.

Q. Can you point to the portions of the operations manual which refer to the reinstatement of insurance?

A. In this Change 16, dated August 16, 1948, page 115, covered the handling of reinstatement applications.

(Testimony of William G. Denardo.)

Q. And what specific portion of the page covers it? Is there a numerical reference?

A. There are a few, and the entire page covers it, but I think the pertinent ones are items 7 and 26, here.

Q. And when you were chief of the premium accounting section, you were governed by this manual, is that correct? A. Yes. [48]

* * *

Cross-Examination

By Mr. Feierbach: [49]

* * *

Q. Your office would handle requests for waiver of insurance premiums?

A. No, the insurance service would, and the portion of my section, we kept the insurance folder, attached the folder to the waiver for insurance premiums, which was forwarded to the disability claims division.

Q. You had access to the disability files of the Veterans Administration?

A. There was actually no disability file.

Q. If a man should apply for disability compensation, isn't there a division of the Veterans Administration that handles that?

A. I think you have reference to what they call the "C" file.

Q. Which is it? A. The "C" file.

Q. What is that?

(Testimony of William G. Denardo.)

A. In that file, they are live cases, applications for compensation—well, just like that. That is the main function of that file, and that is maintained in the regional [50] office.

Q. Well, you say you handled some applications for compensation. What type of compensation is that?

A. No, we handled the applications for waiver of premium; but applications for compensation were handled by the regional office.

Q. Well, what kind of compensation is that?

A. The ones handled by the regional office?

Q. Yes.

A. If a person is disabled or wants to be admitted to a hospital.

Q. I see. Would the initial request come into your office first, so that you could attach the insurance file to it, and forward it over to that office?

A. No. I was in insurance service. We were not part of the regional office.

Q. Well, what were you referring to when you said you received certain requests and attached them to the insurance folder and forwarded them?

A. Applications for waiver of premiums.

Q. Oh, waiver of premiums only? A. Yes.

Q. When you received an application for reinstatement, and the answer to question 10, I am speaking of the form used in 1948, when the application stated "yes" in answer to [51] question 10, what was the procedure of your office?

(Testimony of William G. Denardo.)

A. Could I please have one of the exhibits, that have that?

Q. That, I believe, is Exhibit B, Mr. Clerk. You are looking at Defendant's Exhibit B, which is dated July 12, 1948. Question 10, have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums, to which Mr. Willoughby answered "yes." What is the procedure of the insurance section on receiving such an application for reinstatement?

A. On this particular application there was another portion to that question, that is "C-No." and no C-number was shown, and therefore we processed it. Now, if a C-number were shown, I would not be sure of the procedure at this time. I don't remember. There is a doubt in my mind whether we would handle it or not.

Q. Wouldn't you deem from reading the answer to that question that perhaps Mr. Willoughby was under some type of disability?

A. It would infer that, but there is no C-number shown, and it could be retirement pay from one of the armed services.

Q. You, of course, had access to the file where that C-number could be obtained?

A. No, those files were not maintained in our office [52] in Oakland.

Q. Not in your office, but suppose a C-number were shown, you would go to the office where the files were kept?

A. Well, I don't remember the procedure, but

(Testimony of William G. Denardo.)

in the event we would not have processed such an application, it would have been sent to the medical section, and they would have ascertained—or they would have obtained the C-file if they requested it. I don't remember the procedure.

The Court: Let me ask you, Mr. Denardo, the Oakland office is how designated?

The Witness: Veterans Administration, Insurance Branch No. 12.

The Court: And where was the regional office?

The Witness: Well, we had regional offices in San Francisco and Los Angeles. They are maintained in most principal cities.

The Court: I see.

The Witness: And I believe that the regional office nearest the veteran's home maintained the C-file.

The Court: So the regional office in this case would be either San Francisco or Los Angeles?

The Witness: That is right, if he resided in California. If he resided on the west coast, then the insurance office would keep the insurance [53] records.

* * *

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 52, inclusive, containing the original:

Complaint;

Answer to Complaint;

Pre-Trial Stipulation (marked as Defendant's exhibit "A");

Order for Judgment;

Findings of Fact, Conclusions of Law & Judgment;

Notice of Appeal;

Statement of Points;

Designation of Contents of Record on Appeal;

Designation of Contents of Record on Appeal (by appellee);

Stipulation & Order Thereon Extending Time to Docket Record on Appeal;

and a full, true and correct copy of Notification of Entry of Judgment;

B. 1 volume of reporter's Official Transcript of Proceedings for February 9, 1956;

C. Plaintiff's Exhibits 1 through 14, inclusive, and Defendant's exhibits A through P, inclusive.

I further certify that my fees for preparing the foregoing record amounting to \$1.60, has not been paid by appellant.

Witness my hand and the seal of said District Court, this 21st day of March, 1957.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15504. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Helen McCarthy Willoughby, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed April 1, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

C. A. No. 15504

UNITED STATES OF AMERICA,

Appellant,

vs.

HELEN McCARTHY WILLOUGHBY,

Appellee.

STATEMENT OF POINTS

Appellant, United States of America, presents the following points upon which it intends to rely on appeal:

1. The District Court erred in holding that National Life Insurance Policy No. 17,597,396 was in full force and effect at the death of John R. Willoughby and that the proceeds thereof were then due and payable to plaintiff.

2. The District Court erred in holding that, in approving the insured's application for reinstatement of insurance, the Insurance Section of the Veterans Administration is chargeable with actual notice of facts contained in the files of the Administration's Claims Section.

3. The District Court erred in holding that the Veterans Administration did not rely upon applicant's false and fraudulent material statement of

comparative health when it reinstated the insured's lapsed National Service Life Insurance Policy.

4. The District Court erred in failing to hold that the reinstatements of the insured's National Service Life Insurance Policy were obtained as a result of the insured's false and fraudulent misrepresentations.

Dated: March 29, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division.

MELVIN RICHTER and
SEYMOUR FARBER,
Attorneys Department of
Justice.

/s/ HIRAM W. KWAN,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed March 30, 1957.

